SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 918

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *et al., Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, International Brotherhood of Electrical Workers, AFL-CIO, International Association of Machinists, AFL-CIO, Sheet Metal Workers International Association, AFL-CIO, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Transportation-Communication Employees Union,[1] System Division

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[1] This organization is identified throughout the proceedings below as "The Order of Railroad Telegraphers." Its name was changed to "Transportation-Communication Employees Union" on May 1, 1965 with no change in its structure, membership or jurisdiction. For convenience of reference to the proceedings below, we refer to this organization in this petition as "Telegraphers."

No. 87, and Brotherhood of Maintenance of Way Employes, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on July 16, 1965 enforcing an order of the National Labor Relations Board (hereinafter referred to as the "NLRB").

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals and the dissenting opinion of Chief Judge Bazelon (App. A, *infra*, pp. 1a-4a) are reported at 350 F. 2d 791. The findings of fact, conclusions of law, and the order of the National Labor Relations Board, and the dissenting opinion of Member Jenkins (R. 2-22)[2] are reported at 150 NLRB No. 37.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, p. 4a) was entered on July 16, 1965. Within the prescribed time, a petition for rehearing *en banc* was filed with the court below. On October 7, 1965, the petition was denied (App. C, *infra*, p. 5a). By order dated December 28, 1965, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including January 17, 1966. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254 and Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*), hereinafter referred to as "NLRA".

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[2] "R" references are to the Joint Appendix filed in the court below.

QUESTIONS PRESENTED

1. In a dispute between a railroad and its employees which is subject solely to the provisions of the Railway Labor Act and not subject to the provisions of the NLRA, may the NLRB prohibit the railroad employees from engaging in conduct in connection with such dispute, which conduct is lawful under the Railway Labor Act but unlawful under the NLRA, on the sole ground that their unions, only through their international organizations, represent other persons not involved in the dispute who are "employees" within the meaning of the NLRA because employed in non-railroad industry?

2. Do unions which represent railroad employees exclusively suffer a diminution of their rights in the conduct of a strike against a railroad by joining with other railroad unions who have the same dispute but whose Internationals have non-railroad members?

STATUTES INVOLVED

The relevant provisions of the Railway Labor Act, as amended, 45 U.S.C. Section 151, *et seq.*, are set forth in Appendix D, p. 6a, *infra.*

The relevant provisions of the NLRA are as follows:

> Sec. 2. When used in this Act—
>
> (2) The term *"employer"* . . . shall not include . . . any person subject to the Railway Labor Act, as amended from time to time, . . ."
>
> (3) The term *"employee"* shall . . . not include . . . any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, . . .
>
> (5) The term *"labor organization"* means any organization of any kind, or any agency or em-

ployee representation committee or plan, in which *employees* participate and which exists for the purpose, in whole or in part, of dealing with *employers* concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Sec. 8 (b) It shall be an unfair labor practice for a *labor organization* or its agents—

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 9: *Provided,* that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

STATEMENT

This proceeding arises from a collective bargaining conflict between the Florida East Coast Railway (hereinafter referred to as the "FEC"), a common carrier subject to the Railway Labor Act, and eleven unions

each of which, pursuant to the provisions of the Railway Labor Act, is a bargaining representative of a craft or class of non-operating employees employed by the FEC (R. 28-30).[3]

In August of 1961, the Eleven Cooperating Railway Labor Organizations determined to initiate a national effort to improve the rates of pay of non-operating railway employees and to require the carriers to provide six months advance notice of reduction in work force. Pursuant to this determination appropriate notices, as required by Section 6 of the Railway Labor Act, were served by each of the eleven unions upon the nation's railway carriers including the FEC (R. 30-31). Ultimately, the basic wage and work rule movement was settled with virtually all of the nation's Class I railroads through mutual acceptance on June 5, 1962, of the recommendations of Presidential Emergency Board No. 145. (45 U.S.C. § 160).

The FEC, however, although it had theretofore been represented by the Southeastern Carriers' Conference Committee in the national handling of earlier cases, declined to participate in national handling in this instance and refused to accede to the Emergency Board's proposed resolution of the issues. The specific dispute thus remaining unsettled on the FEC was then mediated by the National Mediation Board under Section 5 of the Railway Labor Act from the latter

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[3] The eleven unions, self-designated as the Eleven Cooperating Railway Labor Organizations, include the petitioners, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes; the Brotherhood of Railroad Signalmen; the Hotel and Restaurant Employees' and Bartenders International Union; the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; and the Brotherhood Railway Carmen of America (R. 30).

part of July to the forepart of December 1962, when the Mediation Board concluded that its efforts were unsuccessful and terminated its services (R. 33-35). On January 23, 1963, the Eleven Cooperating Railway Labor Organizations and each of the constituent unions struck the FEC and began picketing along its property from Jacksonville to Miami, Florida. From November 9, 1963 to December 23, 1963 the specific dispute on the FEC was the subject of investigation and report by Presidential Emergency Board No. 157 (R. 39). It is not shown in the record here but the fact is that the Recommendations of the Emergency Board were accepted by the unions and rejected by the FEC.

Approximately five days before the strike started, the FEC and the National Aeronautics and Space Administration entered into a contract pursuant to which the FEC agreed to design, construct, operate, and maintain a spur line from the FEC mainline to points on and near Merritt Island Launch Area and Cape Kennedy, Florida. The FEC began construction of the spur in July of 1963. On September 11 and 12, 1963, the Telegraphers established pickets at and near Merritt Island Launch Area, and on February 10 and 11, 1964, it picketed various points at both Merritt Island and Cape Kennedy. In June of 1964, picketing at Cape Kennedy and Merritt Island Launch Area was resumed for two days by the Brotherhood of Maintenance of Way Employes (hereinafter referred to as the "BMWE").

The National Labor Relations Board's processes were invoked by the filing of charges alleging violation of Section 8 (b) (4) (B) of the NLRA and in both February and June of 1964, the United States District Court for the Middle District of Florida entered

temporary injunctions restraining the Telegraphers and the BMWE from picketing Merritt Island Launch Area and Cape Kennedy upon the application of the NLRB for such relief under Section 10 (l) of the NLRA (R. 62, 66).

The theory upon which the Board's General Counsel proceeded under Section 10 (l) of the NLRA to enjoin the picketing was ultimately adopted by the Board upon its consideration of the case (R. 10-16).[4] The NLRB concluded that the Eleven Cooperating Railway Labor Organizations were engaged in a joint venture toward the accomplishment of a common collective bargaining objective. It held that each of the joint venturers was "responsible for the conduct of other members of the joint venture and of agents of each other in pursuit of the common aim" (R. 15) and, hence, the Telegraphers and the BMWE "were acting in behalf of all striking unions" (*ibid*). The NLRB, however, acknowledging that the Telegraphers and the BMWE are not "labor organizations" accountable for conduct violative of Section 8 (b)(4) of the NLRA, selected only the other four petitioners herein (hereinafter referred to as the "Internationals") from among the eleven disputing unions and attached to them, as principals responsible for the picketing, the status of "labor organizations" within Section 2(5) of the NLRA (R. 16). To achieve this result, the NLRB looked only to the fact that the Internationals, whose railway employee members number among the shopcraft employees employed by the FEC, also admit

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[4] This matter was presented to and considered by the Board upon a stipulation of facts without the customary hearing before and report of a Trial Examiner (R. 26). Accordingly, there are no contested factual issues.

to membership "employees" within the Section 2(3) definition.[5] NLRB Member Jenkins dissented from the majority on the grounds that the dispute and attendant picketing were governed exclusively by the Railway Labor Act, the scheme of the NLRA requires uniform applicability of its several provisions, and the rationale adopted by the Board in *Masters, Mates and Pilots,* 125 NLRB 113 (any "employee" participation creates a "labor organization"), when extended to cover this case, constitutes the Board a "roving commission" to remedy conduct beyond its grant of jurisdictional power (R. 20-22).

The court below, without comment upon the contested threshold question of whether the Internationals could properly be deemed "labor organizations" in the factual make-up of this case, rested enforcement of the NLRB's order upon the authority of its decision in *International Organization of Masters, Mates and Pilots of America, Inc.* v. *N.L.R.B.,* 351 F. 2d 771. Chief Judge Bazelon dissented from the *per curiam* decision, distinguishing the *Masters, Mates and Pilots* case by pointing out that in that case no "congressional allocation of regulatory responsibility" was involved and that here the record would not sustain a finding that the Internationals acted as principals of the Telegraphers and the BMWE since there was no

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[5] Employees within the "shopcraft" classifications are represented in collective bargaining by six unions, *i.e.* the four petitioning Internationals, the Brotherhood Railway Carmen of America, and the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers (R. 39-40). Together, these unions constitute and are affiliated with the Railway Employes' Department, AFL-CIO (R. 39-45), and on the FEC property, they comprise System Federation No. 69 (R. 46-47).

showing that they had dominant control over the activities of the Eleven Cooperating Railway Labor Organizations (*infra*, pp. 1a-4a).

REASONS FOR GRANTING THE WRIT

1. This case presents questions of substantial importance in the administration of the NLRA and the Railway Labor Act. The holding of the court below, approving the NLRB's application of Section 8 (b) (4) (B) of the NLRA to conduct occurring in the course of a collective bargaining dispute wholly within the purview of the Railway Labor Act, is both erroneous and in defiance of the "natural construction which the text, the legislative setting and the function of the statute command * * *." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 186. The NLRA was designed "to operate as a coherent whole" (*Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Co.,* 370 U.S. 173, 181), and a union which is a "labor organization" subject to the prohibitions of Section 8 (b) (4) must be amenable to all the proscribing aspects of Section 8 (b) and at one and the same time, within a constant factual framework, capable of achieving the benefits of Sections 8 (a) and (9). This precise view was expressed by the NLRB in *Di Giorgio Fruit Corp.,* 87 NLRB No. 125. However, in the instant circumstances it is plain from the definitional impediments created by the exclusion from the NLRA of employers and employees subject to the Railway Labor Act, as set forth in Section 2 (2) and 2 (3), that the NLRA cannot be given a comprehensive and uniform effect. Indeed, the anomalous construction is so severe in its result that the Section 2 (2) and 2 (3) definitions immunize the Internationals from liability for secondary conduct prohibited by sub-sections (A),

(C) and (D) of Section 8 (b)(4). Nothing in either the legislative history or the purpose of the NLRA suggests that one of its provisions can be dissected out and isolated from the whole. The court below now ignores the fragmentizing construction given the NLRA by the NLRB, a result it has heretofore carefully avoided. *Di Giorgio Fruit Corp.* v. *National Labor Relations Board,* 191 F. 2d 642 (C.A., D.C.), *certiorari denied,* 342 U.S. 869.

Moreover, Congress, in recognition of the pre-existing Railway Labor Act, devised the pertinent statutory definitions of the NLRA for the express purpose of delimiting the NLRA's scope and thus preventing NLRB intrusion upon the railway labor field preemptively occupied by the former statute.[6] *California* v. *Taylor,* 353 U.S. 553; *Local Union No. 25, IBT* v. *New York, N.H. & Hartford Railroad Co.,* 350 U.S. 155; *Shields* v. *Utah Idaho Cent. R. Co.,* 305 U.S. 177. In *Paper Makers Importing Co.,* 116 NLRB No. 37, the Board accurately observed "that matters affecting railroads and railroad employees' unions properly pertain to the orbit of the instrumentalities established by Congress in the Railway Labor Act." It further commented that "secondary boycott by a railroad union * * * does not violate Section 8 (b)(4)(A) even if such boycott involves inducement of employees of neutral employers subject to the Act."[7] Now, however, the

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[6] "The exemption of employees of employers subject to the Railway Labor Act is to make it perfectly clear that in providing remedies for unfair labor practices of unions and their agents it was not intended to include such employees." Sen. Report No. 105, 80th Cong., 1st Sess., p. 19 (1947).

[7] Section 8 (b)(4)(A) of the 1947 Act, under which the *Paper Makers* case arose, became Section 8 (b)(4)(B) when Congress again amended the Act in 1959.

NLRB with the sanction of the court below justifies the over-riding of congressional purpose by an all too facile, mechanical reference to the Section 2 (5) phrase "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers."

The legislative history of the original NLRA shows that Congress deliberately defined the term "labor organization" broadly, but this was done "in order that the independence of action guaranteed by Section 7 of the bill and protected by Section 8 shall extend to all organizations of employees that deal with employers" including "employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of Section 8." S. Rep. No. 573 on S. 1958, 74th Congress, 1st Sess., p. 7, reprinted in 2 Legislative History of the National Labor Relations Act, 1935 (Govt. Print. Off., 1935), p. 2306. It is obvious that Congress, by the definition, sought primarily to encompass within the sweep of the NLRA the employer-dominated or supported "company unions" (*ibid* at 2309) then prevalent in the American industrial scene. See *National Labor Relations Board* v. *Cabot Carbon Co.*, 360 U.S. 203. There is no indication, however, that it either intended or desired an administrative expansion of the definition, so as to reach the conduct of unions engaged in a railway labor dispute, solely because they are composed, only fortuitously, of both Section 2 (3) "employees" and the employees of a railroad, notwithstanding that Section 2 (3) employees are not involved in the dispute.

The decision of the NLRB in *International Organization of Masters, Mates and Pilots of America* (Chi-

cago Calumet Stevedoring Co., Inc.), 125 NLRB 113, modified 144 NLRB 1172 and 146 NLRB No. 19, enforced *sub nom, International Organization of Masters, Mates and Pilots* v. *National Labor Relations Board,* 351 F. 2d 771 (C.A., D.C.), even if correctly decided, provides no warrant for the assertion of jurisdiction in this matter.[8] The significant distinction between that case and the one at hand turns upon the fact that there both the primary and secondary aspects of the dispute occurred in an industrial setting wholly within the NLRB's jurisdiction. As pointed out by Chief Judge Bazelon, "that decision does not threaten interference with a congressional allocation of regulatory responsibility" for there, unlike here, "If the unions * * * were not subject to the National Labor Relations Board, they were subject to no regulation at all." (App. A, *infra,* p. 3a.) Here, however, the jurisdictionally determinative primary dispute has been withdrawn from the Board's competence and subjected to comprehensive regulation under the Railway Labor Act. The Internationals do not claim an exemption from the NLRA because of their railway employee membership. Similarly, the Internationals do not claim to be "labor organizations" within the NLRA "when it is to [their] advantage to do so and protest[s] against being so labeled when that position serves [their] end." (Mr. Justice Douglas' dissent in *Interlake, supra,* at 188) They simply seek their congressionally conferred exclusion from the NLRA

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[8] The court below misconceived the "significant question" (App. A, *infra,* pp. 1a-2a). The petitioners have never contended that a "labor organization" can avoid the restraints of Section 8 (b)(4) through the agency of unions not "labor organizations" under the NLRA.

when functioning under the mantle of the Railway Labor Act.

Historically and structually the activities of the Internationals in representing railroad employees have been differentiated from their activities in other industries. The employees they represent on the FEC belong to locals composed exclusively of railroad employees (R. 47-52). The International and district or regional officers, responsible for directing railroad activities are distinct from, and generally differently selected from, other officers responsible for activities in other industries (*ibid*). The certified collective bargaining representative through which these unions and other shopcraft unions function on the FEC is System Federation No. 69, Railway Employes' Department, AFL-CIO (R. 28-29). For over half a century these organizations and the other shop crafts have coordinated their railroad activities on a national and international basis through the Railway Employes' Department, AFL (now AFL-CIO) (R. 39-47). When functioning under the Railway Labor Act they are railway labor organizations just as distinctly as the Telegraphers or BMWE or the operating unions such as the Brotherhood of Railroad Trainmen or the Brotherhood of Locomotive Firemen and Enginemen.

In sum, prior to announcement of the decisions rendered below, it was universally understood that the boundaries marked by Congress in the relation of the NLRA and the Railway Labor Act were clear. They are now blurred. Resolution by this Court is essential not only to restore clarity to the interrelationship of the NLRA and the Railway Labor Act, but also to overcome the mistaken notion that the provisions of the NLRA can be selectively applied. Indeed, this case

dramatically emphasizes the need for the exercise of this Court's reviewing powers to correct "the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Shipbuilding Co.* v. *National Labor Relations Board,* 380 U.S. 300.

2. This Court has acknowledged the Internationals as unions under the Railway Labor Act wholly separate from a "labor organization" status under Section 2 (5) of the NLRA. When this Court in *Railway Employes' Department* v. *Hanson,* 351 U.S. 225, sustained the supremacy of the 1951 union-shop amendment to the Railway Labor Act against the contention that the Nebraska "right-to-work" law precluded its application to railway shopcraft employees represented by the Internationals as well as other railway unions, it recognized that Congress had accorded them rights when representing railroad employees that they could not exercise when functioning under the NLRA.[9]

3. There is no controversy about the fact that Telegraphers and BMWE, which alone carried on the challenged picketing, might have done everything they did and done so lawfully if they alone had been involved in the strike—or presumably if they had had the dispute in common only with other unions whose memberships are composed only of railroad employees (R. 16). The NLRB and the court below hold their conduct unlawful because the other petitioners have the same dispute that they have with the railroad and, as

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[9] Section 14(b) provides that: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a *labor organization* as a condition of employment of any State or Territory in which such execution or application is prohibited by State or Territorial law."

would certainly be expected, all the striking unions cooperated in carrying on the strike (R. 16, App. A pp. 1a-2a, *infra*).

This is not a case of railroad unions acting as instrumentalities for non-railroad unions in carrying on conduct proscribed for the latter in a dispute in a non-railroad industry. (See footnote 8, *supra.*) The Telegraphers and BMWE, as well as the other exclusively railroad unions and the other petitioners, all have their own immediate interests at stake in the strike.

This situation presents a most important question calling for resolution by this Court. Do exclusively railroad unions suffer a diminution of their rights in the conduct of a strike by cooperating with other railroad unions who have the same dispute but whose Internationals have non-railroad members?

We have been unable to conceive of any rational purpose Congress might have had in mind in prescribing such a result. Why should anyone want to make the rights of exclusively railroad unions in an exclusively railroad dispute dependent on the international characteristics of other railroad unions who have the dispute in common with them? If any such result is to be imposed it calls for some rational exposition other than the narrow verbalism indulged by the Board and sanctioned by the court below. See *Pan American World Airways* v. *Carpenters,* 324 F. 2d 217 (C.A., 9), *certiorari denied,* 376 U.S. 964.

The functional scheme of the Railway Labor Act as it governs disputes within the railroad and airline industries only begins with "the traditional instruments of mediation, conciliation and arbitration" (*General Committee* v. *M-K-T-R. R. Co.,* 320 U.S. 323,

332) and ultimately all "available economic weapons" may be invoked in an effort to force a bargaining objective (*ibid*). The Board and the court below now say the validity of that statement turn on fortuitous and irrelevant circumstances.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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